(5)

Supreme Court, U.S.
FILED
OCT 20 2004
OFFICE OF THE CLERK

No. 04-5928

IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE GOVERNMENT OF THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER JOSE ERNESTO MEDELLIN

SANDRA L. BABCOCK
2520 Park Avenue South
Minneapolis, MN 55404
(612) 871-5080

Counsel of Record for
Amicus Curiae

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

REASONS FOR GRANTING THE PETITION 3

I. Mexico and the United States Agreed by Treaty to Submit Disputes About the Vienna Convention to the International Court of Justice for Binding Resolution 3

II. The United States Must Provide Review and Reconsideration of Mr. Medellín's Conviction and Sentence as Required by *Avena* 5

A. The Lower Courts' Summary Resolution of Mr. Medellín's Article 36 Claim Was Clearly Deficient Under *Avena* 6

B. The Article 36 Violation Deprived Mexico of the Opportunity To Provide the Extraordinary Assistance that it Regularly Provides Mexican Capital Defendants. 10

III. The Decision Below Rested in Part on a State Department Interpretation of the Vienna Convention That Cannot Survive *LaGrand* and *Avena.* 12

IV. The United States Has a Significant Interest in Ensuring Respect for the Rights of Consular Protection 14

CONCLUSION 18

TABLE OF AUTHORITIES

International Cases

Avena and Other Mexican Nationals (Mex. v. U.S.),
2004 I.C.J. 128 (Mar. 31) ..... *passim*

LaGrand (F.R.G. v. U.S.),
2001 I.C.J. 104 (Jun. 27) ..... *passim*

United States Diplomatic and Consular Staff in
Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24),
Reprinted in 75 AM. J. INT'L L. 746 (1980),
19 I.L.M. 553 (1980) 16-17

Vienna Convention on Consular Relations (Para. v.
U.S.) 1998 I.C.J. 248 (Provisional Measures Order
of Apr. 9) 16

Federal Cases

Breard v. Greene,
523 U.S. 371 (1998) 9

Breard v. Pruett,
134 F.3d 615 (4th Cir. 1998) 16

Eddings v. Oklahoma,
455 U.S. 104 (1982) 12

Hilton v. Guyot,
159 U.S. 113 (1895) 14

Medellin v. Cockrell,
No. H-01-4078 (S.D. Tex. June 26, 2003) 7

Penry v. Lynaugh,
492 U.S. 302 (1989) 12

United States v. De La Pava,
268 F.3d 157 (2d Cir. 2001) 14

United States v. Duarte-Acero,
296 F.3d 1277 (11th Cir. 2002) 14

United States v. Jimenez-Nava,
243 F.3d 192 (5th Cir. 2001) 12-14

United States v. Li,
206 F.3d 56 (1st Cir. 2000) 12-14

United States v. Page,
232 F.3d 536 (6th Cir. 2000) 14

State Cases

Torres v. State,
No. PCD-04-442
(Okla. Crim. App. May 13, 2004) 10-11

Valdez v. State,
46 P.3d 703 (Okla. Crim. App. 2002) 10

Treaties, Federal Statutes And Legislative Materials

Optional Protocol to the Vienna Convention on
Consular Relations Concerning the
Compulsory Settlement of Disputes, *opened for signature*
Apr. 24, 1963, 21 U.S.T. 325,
596 U.N.T.S. 261 ..... *passim*

Statute of the International Court of Justice,
59 Stat. 1055, T.S. No. 993 4

U.N. Charter, *opened for signature* Jun. 26, 1945,
59 Stat. 1031, T.S. No. 993 4

Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596
U.N.T.S. 261 ..... *passim*

Other Authorities

William Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies*, 31 VAND. J. TRANSNAT'L L. 257 (1998) 11

Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 124 (Oral Pleadings, Dec. 19, 2003, 3:00 p.m.) 8 n.4

Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire*, N.Y. TIMES, Oct. 26, 2000, at A20 10

C. Cooper, *Foes of Death Penalty Have a Friend in Mexico*, SACRAMENTO BEE, Jun. 26 1994, at A1 10

Counter-Memorial of the United States of America, (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Nov. 3, 2003) 11

Michael Fleishman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in the United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. L. 359, 365-74 (2003) 10

RANDY HERTZ AND JAMES S. LIEBMAN, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCESS (4th ed. 2001)..... 9

LUKE T. LEE, CONSULAR LAW AND PRACTICE (2d ed. 1991)..... 15

Louis Shagun and Juanita Darling, *Unexpected Friend On Death Row*, L.A. TIMES, Jan. 2, 1994, at A1 10

Memorial of the Government of the United States of America, (U.S. v. Iran), (United States Diplomatic and Consular Staff in Tehran) (I.C.J.

1979)..... 17

Memorial of Mexico, (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. June 20, 2003)..... 6, 11

Mexico's Application Instituting Proceedings (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003)..... 4

Respondent's Original Answer, *Ex Parte Medellin*, No. 675430-A (339th Dist. Ct., Tex.) 7

Respondent's Proposed Finding of Fact, Conclusions of Law, and Order, No. 675430-A, (339th Dist. Ct., Tex. Jan. 22, 2001)..... 6, 7

United States State Department Legal Adviser William H. Taft IV, Remarks to the National Association of Attorneys General (Mar. 20, 2003) 15

INTEREST OF AMICUS CURIAE[1]

By signing and ratifying the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, the Government of Mexico and the Government of the United States made commitments to each other, to their other treaty partners, and to the rule of law. Specifically, the United States committed that detained Mexican nationals would be promptly notified of their right to seek consular assistance, and that Mexico would be permitted to provide consular protection to those nationals. And by signing and ratifying the Optional Protocol to the Vienna Convention, the Government of Mexico and the Government of the United States committed to a dispute resolution mechanism that conferred jurisdiction on the International Court of Justice to resolve conflicts over the interpretation and application of the treaty's provisions. Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325. These commitments have now been called into question by the actions of the United States Court of Appeals for the Fifth Circuit.

On March 31, 2004, the International Court of Justice ("ICJ") rendered its judgment in *Avena and Other Mexican Nationals*. The ICJ held that the United States had violated the

---

[1] Petitioner's Counsel of Record and Mexico's Counsel of Record served as co-counsel to Mexico as *amicus curiae* in *Torres v. State*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004), and this brief is based in part on a brief prepared in that case. No person or entity other than the Government of Mexico made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have given blanket consent to the filing of amicus briefs by letters of consent on record with the Clerk.

rights of Mexico and of Mr. Medellín under Article 36 of the Vienna Convention. As a remedy for those violations, the ICJ held that the United States must provide Mr. Medellín with review and reconsideration of his conviction and sentence that gives full effect to the purposes of Article 36. Nevertheless, on May 20, 2004, the Court of Appeals refused even to grant a certificate of appealability to review Mr. Medellín's Vienna Convention claim, violating the international legal obligation of the United States to abide by the ICJ's judgment.

Mexico has a direct interest in compliance by the United States with *Avena*. The very purpose of Article 36 of the Vienna Convention is to permit the nations that signed that Convention – including Mexico, the United States, and 164 other countries – to protect the interests of their citizens when they are arrested or otherwise detained while living, working, or traveling abroad. That interest cannot be more acute than when a citizen is tried in another country for a crime that may lead to his execution.

Further, Mexico brought the *Avena* case to establish the scope of the Vienna Convention violations *in Mr. Medellín's case*, among others, and to resolve an ongoing dispute with the United States over the remedy to which he is entitled. The International Court of Justice reviewed the facts of Mr. Medellín's case, determined that the United States had violated his individual right to seek consular assistance, and crafted a specific remedy to be provided by the United States judiciary. Under both international and United States law, *Avena* constitutes a binding adjudication of Mr. Medellín's rights that the United States must fully implement. The Court of Appeals has violated its own obligation to do so.

For that reason, this case raises issues that are fundamentally different than those this Court has considered in every previous petition for writ of certiorari raising a Vienna Convention violation. *None* of the previous cases reviewed by this Court have asked the Court to apply a final judgment of the International Court of Justice, a tribunal whose judgments the United States is bound to uphold, adjudicating the petitioner's *own* rights, after proceedings in which the United States fully participated.

In compliance with the treaty obligations of the United States, Mexico respectfully requests that this Court grant certiorari, and allow for the review and reconsideration mandated by the ICJ in *Avena*.

REASONS FOR GRANTING THE PETITION

I. Mexico and the United States Agreed by Treaty to Submit Disputes About the Vienna Convention to the International Court of Justice for Binding Resolution.

When the United States and Mexico ratified the Vienna Convention on Consular Relations and its Optional Protocol, they exchanged solemn promises to abide by the terms of those instruments. Article 1 of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an

application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. 1.

On January 9, 2003, after determining that the United States had violated the Vienna Convention in virtually every case in which a Mexican national was facing the death penalty, and after unsuccessfully seeking remedies for those nationals through legal and diplomatic channels, Mexico invoked the Optional Protocol and brought suit in the International Court of Justice. *See* Mexico's Application Instituting Proceedings, (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003), *available at* http://www.icj-cij.org. The United States fully participated in those proceedings, at the conclusion of which the ICJ found that the United States had violated the Article 36 rights of 51 Mexican nationals, including Mr. Medellín. Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31)[hereinafter "*Avena* Judgment"].

The binding character of the commitment the United States made in the Optional Protocol is reinforced by the United Nations Charter, also ratified by both the United States and Mexico. By Article 94(1) of the Charter, the United States expressly agreed to "comply with the decision of the International Court of Justice in any case to which it is a party." U.N. CHARTER, art. 94, para. 1. By Article 59 of the Statute of the International Court of Justice, which forms part of the Charter, the United States expressly agreed that judgments of the Court have "binding force" upon it in cases to which it is a party. Statute of the International Court of Justice, art. 59, June

26, 1945, 59 Stat. 1055, T.S. 993.

Without the United States's express consent, the International Court of Justice could not have heard the *Avena* case or rendered the *Avena* Judgment. Having given its consent, and having fully participated in the proceedings, the United States must now abide by the result.

II. The United States Must Provide Review and Reconsideration of Mr. Medellín's Conviction and Sentence as Required by *Avena*.

In *Avena*, the International Court of Justice held (by fourteen votes to one, the majority including Judges from both the United States and Mexico) that the United States had violated its obligation under Article 36(1) to inform Mr. Medellín of his right to consular notification and assistance, as well as the rights of Mexico to communicate with him, render consular assistance, and arrange for his legal representation. *Avena* Judgment, para. 153(4)-(7). To remedy these violations, the ICJ held that the United States had to provide "review and reconsideration" of Mr. Medellín's conviction and sentence by fully assessing the prejudice caused by the Vienna Convention violations. *Id.* at para. 153(9). The ICJ rejected the United States's argument that review and reconsideration could be achieved through the clemency process, holding instead that the review must occur "within the overall judicial proceedings relating to the individual defendant concerned." *Id.* at 141; *see also id.* at 140.

The International Court of Justice made clear that the

judicial "review and reconsideration" contemplated by its decision had not yet taken place in Mr. Medellín's case. Mexico supplied the International Court of Justice with the Texas trial court's findings of fact and conclusions of law from state post-conviction proceedings,[2] and provided a separate summary of the Texas court's reasons for rejecting Mr. Medellín's Vienna Convention claim. Memorial of Mexico at A-103, Annex 7, para. 238. The United States submitted its own account of state and federal post-conviction proceedings, including a description of how each court had resolved Mr. Medellín's Vienna Convention claim. Counter Memorial of the United States of America at A-223, App. 38, para. 7, (Mex. v. U.S.), No. 128 (Avena and other Mexican Nationals) (I.C.J. Nov. 3, 2003). After reviewing these facts, the court determined that Mr. Medellín was entitled to *de novo* review and reconsideration in accordance with the guidelines set forth in its opinion. *Avena* Judgment, para. 153(9).

A. The Lower Courts' Summary Resolution of Mr. Medellín's Article 36 Claim Was Clearly Deficient Under *Avena*.

The *Avena* Court set forth specific requirements for effective review and reconsideration – none of which have been met by the courts that have summarily disposed of Mr. Medellín's Article 36 claim.

[2] *See* Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, No. 675430-A, (339th Dist. Ct., Tex. Jan. 22, 2001) (Petition for Writ of Certiorari, App. 34A) [hereinafter "Respondent's Proposed Findings"]; Memorial of Mexico, Annex 55, (Mex. v. U.S.), No. 128 (Avena and other Mexican Nationals) (I.C.J. June 20, 2003).

First, the *Avena* Court reiterated its holding in *LaGrand* that procedural default doctrines may not be invoked where it was "the failure of the United States itself to inform" the national of his Article 36 rights that impeded his ability to raise the violation at trial. *Id.* at paras. 112-13; LaGrand (F.R.G. v. U.S.), paras. 90-91, 2001 I.C.J. 104 (June 27)[hereinafter "*LaGrand* Judgment"]. Yet contrary to the International Court's holdings in *LaGrand* and *Avena*, every court has found Mr. Medellín's Article 36 claim to be procedurally barred, even though Mr. Medellín was never notified of his Article 36 rights, and did not learn of his right to seek consular assistance until after his direct appeal had already been denied. Respondent's Proposed Findings at 19; *Medellín v. Cockrell*, No. H-01-4078, Order at 18-20 (S.D. Tex. Jun. 26, 2003).

Second, the International Court stressed that the review and reconsideration had to be "effective" and "guarantee that the violation and the possible prejudice caused by that violation . . . be fully examined and taken into account." *Avena* Judgment at para. 138; *see also id.* at para. 131. Yet the lower courts' resolution of the claim was neither "effective" nor thorough,[3] and failed to apply the proper harm analysis. Both

[3] The trial court adopted verbatim the state's proposed findings of fact and conclusions of law, without bothering even to change the title of the document. The state court's failure to engage in an independent analysis of the claim is apparent from even a superficial review of the record. For example, the court signed off on the state's proposed finding that Mr. Medellín "fail[ed] to show foreign nationality." Respondent's Proposed Findings at 19. Yet the trial transcript and one of the state's own exhibits provided conclusive proof to the contrary. Mr. Medellín's father testified at the penalty phase that his son was born in Mexico, and had not become a permanent resident. S.F. vol. 35 at 282. Mr. Medellín himself told the police during his interrogation that he was born in Mexico, State's Ex. 113 at

the Texas trial court and the federal district court determined that since Mr. Medellín had received the protections to which he was entitled under the United States Constitution, he had failed to show harm. Respondent's Proposed Findings at 20; *Medellín v. Cockrell*, No. H-01-4078, Order at 23. Indeed, this was precisely the argument advanced by the United States in the *Avena* proceedings,[4] and it was soundly rejected by the International Court of Justice:

> [I]n a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" – a concept relevant to the enjoyment of due process rights under the United States Constitution – but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that *full weight* is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

Avena Judgment, para. 139 (emphasis added).

Third, the *Avena* Court explained that review and reconsideration must be conducted by a court that is empowered "to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.* at para. 122. In the United States, facts are examined in an adversary proceeding during which a party has a full opportunity to conduct discovery, present witnesses and other evidence. *See* Rule 8 of the Rules Governing §2254 Cases in the United States District Courts; RANDY HERTZ & JAMES S. LIEBMAN, 2 FED. HABEAS CORPUS PRACTICE & PROC. § 20.1(b) (4th ed. 2001). As this Court observed in *Breard v. Greene*, "[w]ithout a hearing, [the petitioner] cannot establish how the Consul would have advised him, [or] how the advice of his attorneys differed from the advice the Consul could have provided." 523 U.S. 371, 376 (1998). Yet neither the federal district court nor the Texas trial court held an evidentiary hearing on the Article 36 claim.

The lower courts have failed in their obligation to provide effective review and reconsideration. It is now the responsibility of this Court to enforce the mandate of the International Court of Justice.

000076 (Statement of José Ernesto Medellín Rojas), and informed pre-trial services that he was not a United States citizen. Respondent's Original Answer, Exhibit C, No. 675430-A (339th Dist. Ct., Tex. Feb. 16, 2000) (Harris County Pretrial Services Agency Defendant Interview form, dated June 29, 1993).

[4] *See, e.g.*, Transcript at para. 3.22, Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 124 (Oral Pleadings, Dec. 19, 2003, 3:00 p.m.) ("It is true that a court in the United States generally will not grant relief to an individual for a claim cast merely as a claim for a breach of the Vienna Convention, as such. But. . . . that is not a bar to satisfying the requirements of *LaGrand*. . . the courts can entertain any and all claims alleging that a breach of the Convention has resulted in harm to a specified right that is essential to a fair trial.").

B. The Article 36 Violation Deprived Mexico of the Opportunity To Provide the Extraordinary Assistance that it Regularly Provides Mexican Capital Defendants.

Since well before the trial of Mr. Medellín, Mexico has provided critical resources to aid in the defense of its nationals facing the death penalty. *See, e.g.*, Memorial of Mexico at 11-38 (describing the history and nature of Mexico's consular assistance program); Michael Fleishman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. LAW 359, 366-374 (2003) (same); *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2001) (concluding that Mexico would have intervened in a 1989 capital murder prosecution to assist with a Mexican national's defense and to provide resources to ensure that the defendant received a fair trial and sentencing hearing); Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire*, N.Y. TIMES, Oct. 26, 2000, at A20 (describing consular involvement in a Florida capital prosecution, and noting Mexico's reported involvement in 261 death penalty cases since 1994); Louis Shagun & Juanita Darling, *Unexpected Friend on Death Row*, L.A. TIMES, January 2, 1994, at A1 (describing Mexico's intervention in capital cases in Idaho, California, Kentucky, and Texas); C. Cooper, *Foes of Death Penalty Have a Friend in Mexico*, SACRAMENTO BEE, 26 June 1994, at A1 (noting Mexico's intervention in Kentucky and California capital cases where death penalty avoided). Indeed, Mexico can trace its involvement in criminal cases involving its nationals to the

early twentieth century. *See Torres v. State*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004), Petition for Writ of Certiorari at 155A (Chapel, J., concurring) (noting that Mexico has had a tradition of active consular assistance in capital cases since the 1920s); William Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 272 n.2 (1998) (citing a 1934 case in which Mexican consular officials sought access to a national held in a California jail).

Consular officials provide funding for experts and investigators, assist in gathering documents relevant to the penalty phase defense, assist in conducting mitigation investigations, act as a liaison with Spanish-speaking family members, and most important, ensure that Mexican nationals are represented by competent and experienced defense counsel. Not surprisingly, the United States government acknowledges that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." 1 Counter-Memorial at 186.

Given the extraordinary consular assistance that Mexico provides its nationals in capital cases, the import of the Vienna Convention violation in Mr. Medellín's case is clear. Further, in light of trial counsel's appalling performance, there is little doubt that the assistance available from Mexican consular officials would have had a dramatic effect on the quality of the defense – particularly at the penalty phase. Trial counsel was suspended from the practice of law for ethics violations during the investigation and prosecution of Mr. Medellín's case. Memorial of Mexico, Annex 7, App. A, para. 232. The centerpiece of counsel's two-hour penalty phase defense was a psychologist, Dr. Wendell Dickerson, who had never met Mr.

Medellín. S. F. vol. 35 at 294-348. The defense utterly failed to explore Mr. Medellín's life history in order to provide a mitigating explanation for his role in the crime—the most elemental component of effective capital case advocacy. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background. . . may be less culpable than defendants who have no such excuse"); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)) (noting that consideration of the offender's life history is a "'part of the process of inflicting the penalty of death'").

III. The Decision Below Rested in Part on a State Department Interpretation of the Vienna Convention That Cannot Survive *LaGrand* and *Avena*.

In *LaGrand* and *Avena*, the International Court of Justice held that detained foreign nationals have individually enforceable rights under Article 36 of the Vienna Convention. *LaGrand* Judgment, paras. 77, 89; *Avena* Judgment, paras. 40, 140. In reliance on its prior opinion in *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001), the Court of Appeals held to the contrary. The decision in *Jimenez-Nava*, however, relied on the interpretation of the Vienna Convention provided by the State Department to the First Circuit in the pre-*LaGrand* case of *United States v. Li*, 206 F.3d 56 (1st Cir. 2000). That interpretation cannot survive *LaGrand* and *Avena*,

and the State Department has not reiterated that interpretation at any time since those judgments were issued.

In *Li*, the Court of Appeals invited the State Department to answer several questions concerning the interpretation of Article 36 of the Vienna Convention. In response, the State Department opined that the Vienna Convention did not create individual rights, and that "the right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals." *Id.* at 63. Further, the State Department expressed its view that "[t]he [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Id.* The *Li* Court relied on the State Department position in holding that Article 36 did not give rise to individual rights. *Id.* ("[i]n the State Department's view, the treaties do not create individual rights at all").

The United States took the same position before the International Court of Justice in *LaGrand*, but that Court rejected it. It held that individuals *do* have rights under the Convention, that their rights are *not* derivative of the sending state, and that a diplomatic apology was *not* a sufficient remedy for a violation of Article 36. *LaGrand* Judgment, paras. 76, 77, 89, 123, 125.

The United States did not repeat in *Avena* the arguments the ICJ had rejected in *LaGrand*. Nor has the State Department urged any court to adopt *Li*'s interpretation of Article 36 since *LaGrand* was decided. Given the undertaking the United States made in the Optional Protocol to submit disputes arising from the Convention for binding adjudication by the ICJ, it could not

continue to promote its earlier, erroneous interpretation of Article 36. Nevertheless, at least three other Courts of Appeals in addition to the Fifth Circuit have relied upon the State Department's now obsolete opinion in analyzing Vienna Convention violations. *See United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002) (citing *Li*'s conclusions regarding the lack of individual rights); *United States v. De La Pava*, 268 F.3d 157, 164-65 n.6 (2d Cir. 2001) (referring to the State Department's representations in *United States v. Li*); *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000) (citing to *Li* and granting deference to the State Department's opinion on interpretation of the treaty).

These decisions make clear that, without the guidance of this Court, other United States courts will continue to follow the outdated reasoning of the *Li* Court, or will, like the Court of Appeals here, find themselves bound by prior circuit precedent. Mexico respectfully asks that this Court grant the petition and instruct the lower courts that the ICJ's interpretation of Article 36 as granting individual rights supersedes prior jurisprudence to the contrary, and is binding as a matter of international and domestic law.

IV. The United States Has a Significant Interest in Ensuring Respect for the Rights of Consular Protection.

As this Court has taught, "international law is founded upon mutuality and reciprocity." *Hilton v. Guyot*, 159 U.S. 113 (1895). The United States has specifically recognized this with respect to the Vienna Convention, stating that:

> [B]ecause these treaty obligations are the law of the land, we need to comply with them.... These obligations were all entered into as part of a very aggressive effort of the United States Government to protect American citizens abroad. To get protection for Americans abroad in our treaties, it was necessary to provide reciprocal protections to foreign nationals in the United States. We obviously can't insist that other countries comply and then not comply ourselves. So it is both right and fair that we comply.

U.S. State Dep't Legal Adviser William H. Taft IV, Remarks to the Nat'l Assoc. of Att'ys General (Mar. 20, 2003), *available at* http://usinfo.state.gov/dhr/Archive/2003/Oct/09-464655.html.

As a close neighbor and treaty partner of the United States, Mexico fully appreciates that the United States has long been one of the most vigorous advocates of strict compliance with the Vienna Convention. The United States represented to the International Court of Justice in the *Avena* proceedings that it has undertaken a broad program of education and support in order to increase compliance with these important rights within the United States. *Avena* Judgment, para. 147; *see also LaGrand* Judgment, para. 128(6). Abroad, United States consular officials regularly invoke and depend on their right to render consular assistance in order to protect the interests of United States citizens. *See* LUKE T. LEE, CONSULAR LAW & PRACTICE 143-51 (2d ed. 1991) (noting that U.S. consular officials have invoked these rights in the cases of Americans detained in Russia, Syria, and El Salvador, among other countries).

It should be clear, however, that if the United States

fails to observe its obligations under the Vienna Convention, or fails to observe a judgment rendered under the authority of the Optional Protocol to that Convention, that failure would give other countries reason to ignore their own obligations to the United States and its citizens. As Judge Butzner of the United States Court of Appeals for the Fourth Circuit recognized, the "freedom and safety" of American citizens abroad would be "seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example." *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring). Judge Stephen Schwebel, former United States Judge and President of the International Court of Justice, made the same point when he stated in an earlier case involving the Vienna Convention that "the citizens of no State have a higher interest in the observance of [Vienna Convention] obligations than the peripatetic citizens of the United States." Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 259 (Provisional Measures Order of Apr. 9) (declaration of President Schwebel).

Indeed, when Mexico filed the *Avena* case in the International Court of Justice to protect its nationals who had been condemned to death in criminal proceedings in a foreign state, it did exactly what the United States had done when it filed the *Tehran Hostages* case in the ICJ in order to protect its citizens who had been unlawfully taken hostage by Iranian militants in the course of the Iranian Revolution. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7 (Provisional Measures Order of Dec. 15); 1980 I.C.J. 3 (Judgment of May 24) (the "*Tehran Hostages* case"). In the *Tehran Hostages* case, the United States relied on the very treaty, the Vienna Convention on Consular Relations, on

which Mexico relied in *Avena*, and it founded the Court's jurisdiction on the very same instrument, the Optional Protocol to the Vienna Convention, on which Mexico proceeded in *Avena*.

In asking this Court to abide by the *Avena* Judgment, Mexico is doing exactly as the United States did with respect to the judgment in the *Tehran Hostages* case. The United States did not treat the Court's judgment as a hortatory suggestion, but instead repeatedly insisted that Iran had a legal obligation to comply with the Court's decision. *See, e.g.*, Memorial of the Government of the United States of America at 187-188, (U.S. v. Iran) (1979) ("[A judgment of the Court] ensure[s] recognition of a situation at law, once and for all and with binding force as between the Parties, so that the legal position thus established cannot again be called in question.").

The United States leads by example. Just as it invoked the rule of law to protect its own nationals abroad, it should abide by the rule of law when the interests of foreign nationals in the United States are at stake. This Court should uphold the promises the United States made to Mexico and the world community by granting review of Mr. Medellín's petition, and ordering the review and reconsideration mandated by the International Court of Justice in the *Avena* case.

CONCLUSION

Amicus curiae the Government of Mexico respectfully urges this Court to grant Mr. Medellín's petition for certiorari.

Respectfully submitted,

Sandra L. Babcock
Counsel of Record
2520 Park Avenue South
Minneapolis, MN 55404
(612) 871-5080